91-294

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MARYLAND HIGHWAY CONTRACTORS ASSOCIATION, INC.,

Petitioner,

v.

STATE OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

LESLIE ROBERT STELLMAN,
Counsel of Record
for Petitioner,

JOHN W. KYLE,
LITTLER, MENDELSON, FASTIFF & TICHY,
The World Trade Center, Suite 1653,
Baltimore, Maryland 21202-3005,

WALTER H. RYLAND,
WILLIAMS, MULLEN, CHRISTIAN & DOBBINS,
Two James Center,
1021 East Carey Street,
Richmond, Virginia 23210-1320.

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THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,

Plaintiff

v.

STATE OF MARYLAND, et al.

Defendants

CIVIL ACTION NO. R-89-2410

: : oOo : :

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (CA-89-2410-R)

Argued: January 8, 1991
Decided: May 20, 1991

Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Vacated and remanded by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Judge Murnaghan joined.

ARGUED: Leslie Robert Stellman, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland; Walter Howard Ryland, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia, for Appellant. Ralph S. Tyler, Assistant Attorney General, Baltimore, Maryland, for Appellees. ON BRIEF: John William Kyle, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland; Wayland E. Hundley, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, P.C., Richmond, Virginia, for Appellant. J. Joseph Curran, Jr., Attorney General, Andrew H. Baida, Assistant Attorney General, Baltimore, Maryland, for Appellees.

ERVIN, Chief Judge:

The Maryland Highway Contractors Association, Inc. ("Association") sought declaratory and injunctive relief against the State of Maryland ("Maryland") and several state officials in their official capacities in the United States District Court for the District of Maryland. Specifically, the Association wanted a determination that Maryland's Minority Business Enterprise[1/] ("MBE") statute and accompanying regulations violated the

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1/ In 1988, a Minority Business Enterprise was defined as a legal entity that was at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific Islanders; 7. women; or 8. physically or mentally disabled individuals." Md. State Fin. & Procurement Code Ann. § 14-301(e) (1988) (repealed by 1990 Md. Laws Ch. 708).

constitutional and statutory rights of the Association and its members. By a motion for summary judgment, Maryland challenged the Association's standing to sue, and the district court granted the motion, finding no standing.

In the interim between the district court's decision and this appeal, the Maryland legislature repealed the MBE statute at issue here and replaced it with a new one. We find that this repeal and subsequent enactment rendered this case moot, and so we hereby vacate the district court's decision and remand to the district court with instructions to dismiss.

I.

The Association is an organization of contracting firms whose members regularly bid on highway construction projects. The Association brought suit alleging that the 1988 MBE statute and accompanying regula-

tions violate the Constitution and federal statutes. The Association claimed that the statute and regulations violate the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 2000d, and 42 U.S.C. § 1983.

Maryland moved for summary judgment on the ground that the Association had no standing to sue. Extensive discovery was conducted on the issue of standing, and the district court held a hearing to resolve the issue. After oral argument, the district court agreed with Maryland that the Association lacked standing to sue and granted Maryland's motion for summary judgment on that basis. This appeal followed.

II.

In 1978, Maryland adopted a statutory and regulatory scheme designed to encourage participation by MBEs certified by state

law and to provide a fair share of contracts to MBEs for the procurement of supplies and services. The version of the statute in effect at the start of these proceedings was Md. State Fin. & Procurement Code Ann. § 14-302(a)(1), (2) (1988) (repealed by 1990 Md. Laws Ch. 708). The 1988 MBE scheme set a goal for several Maryland departments to award 10% of their total dollar of procurement contracts either directly or indirectly to certified MBEs. The departments included: The Department of General Services; the Interagency Committee on School Construction; the Maryland Food Center Authority; the Maryland Stadium Authority; and the University of Maryland System. Md. State Fin. & Procurement Code Ann. § 14-302(b)(1) (1988) (repealed by 1990 Md. Laws Ch. 708). The Department of Transportation was supposed to achieve the same goal, but only

with respect to procurement contracts totalling $100,000 or more. Md. State Fin. & Procurement Code Ann. § 14-302(b)(2) (1988) (repealed by 1990 Md. Laws Ch. 708).

The 1988 MBE statute directed the Maryland Board of Public Works to adopt regulations to achieve the goals of the statute. See Code of Maryland Regulations (COMAR) 21.11.03.01 et seq. The regulations adopted set forth the following requirements: (1) each contract solicitation must set out the expected degree of MBE participation; (2) the relevant state agency must provide a list of certified MBEs to each prospective contractor. The regulations also set out provisions that ensure the uniformity of requests for bids; provisions that ensure the timing of requests and submissions of bids on subcontracts; and provisions that ensure that the State is not fiscally disadvantaged by

inadequate responses by MBEs to requests for bids. COMAR 21.11.03.01 et seq.

The regulations also provided that MBE participation may be waived under certain circumstances. COMAR 21.11.03.11. Waiver might be obtained if the contract bidder could make a reasonable demonstration that MBE participation was not obtainable, or was not obtainable at a reasonable price, but only if the state procurement agency decided that the public interest would be served by the waiver. Id.

III.

On July 1, 1990, after the decision by the district court in this case, the Maryland legislature repealed the MBE statute and enacted a new and revised MBE statute to replace it. See Md. State Fin. & Procurement Code Ann. §§ 14-301 et seq. (1990). The new statute, by its terms, attempts to comply with the Supreme Court's

holding regarding MBE statutes in City of Richmond v. Croson, 488 U.S. 469 (1989).[2/]

Maryland commissioned a Minority Business Utilization Study, held legislative hearings, and determined that Maryland had engaged in discrimination against certain groups. See 1990 Md. Laws Ch. 708, preamble. As a result of the study, the Maryland legislature enacted a

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2/ In Croson, the Supreme Court held that a state or municipality must show that it had actually discriminated against minority groups before it could enact remedial legislation. 488 U.S. at 492. The Court explained:

> While the states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.

488 U.S. at 504.

new MBE statute protecting those classes of minorities which the study showed Maryland had discriminated against: American Indians; Asians; Blacks; Hispanics; women; and physically or mentally disabled individuals. Md. State Fin. & Procurement Code Ann. § 14-301(f) (1990). The legislature thus repealed the former portion of the statute which protected Alaskan natives and Pacific Islanders. Compare Md. State Fin. & Procurement Code Ann. § 14-301(f) (1990) with Md. State Fin. & Procurement Code Ann. § 14-301(e) (1988) (repealed by 1990 Md. Laws Ch. 708). Most of the remaining provisions in the MBE statute were not changed by the new MBE law.

IV.

The district court held that the Association lacked standing to sue in this case. We must review the court's holding

"in light of [the state] law as it now stands, not as it stood when the judgment below was entered." Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972) (per curiam); Fusari v. Steinberg, 419 U.S. 370, 387 (1975). As noted above, the Maryland legislature repealed the MBE statute which was effective when the district court rendered its decision, replacing the old MBE statute with a new one. The actions by the Maryland legislature had the effect of rendering the Association's case moot.

A case is moot when it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Diffenderfer, 404 U.S. at 414 (quoting Hall v. Beals, 396 U.S. 45, 48 (1969)). Here, we would be rendering an advisory opinion if we reached the merits

of this case. The statute challenged by the Association no longer exists; a new statute replaced it. In order to determine if someone has been injured by the new statute, we would need more information about the new statute than is presently before us. "We are unable meaningfully to assess the issues in this appeal on the present record." Fusari, 419 U.S. at 387.

The Association asserts that the new statute has "only minor, insignificant modifications" from the old one. We disagree. The new statute was enacted after an independent study was conducted to ascertain whether Maryland participated in discrimination. As a result of the study, the new statute eliminated two of the groups previously protected by the MBE statute. These facts show that Maryland was attempting to meet the requirements of the Supreme Court's holding in City of

Richmond v. Croson, 488 U.S. 469 (1989). Whether Maryland's new statute meets the requirements of Croson will likely be the subject of a challenge to the new statute. However, we do not have enough facts before us in this case to evaluate the new statute in light of Croson. As a result, the present case is moot.

When a case is rendered moot while on appeal, the established practice is to reverse or vacate the judgment below and remand with a direction to dismiss. United States v. Munsinger, 340 U.S. 36, 39 (1950). Because we hold that the Association's claim against Maryland is moot, we vacate the district court's order granting summary judgment to Maryland, and we direct that court to dismiss this case as moot.

V.

Because of the likelihood of a new attack upon the constitutionality of the present Maryland MBE statute, we elect to address the issue of standing in order to guide subsequent litigation.

Standing is a component of a federal court's limited jurisdiction. Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. Const. Art. III. The requirement of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968). Thus, in order to have standing, a party must be able to demonstrate a "distinct and palpable injury" that is likely to be redressed if the requested relief is granted. Valley

Forge College v. Americans United, 454 U.S. 464, 488 (1982).

Associations can allege standing based upon two distinct theories. First, the association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. 490, 511 (1975). Second, the association may have standing as the representative of its members who have been harmed. Id. See also Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

A.

In this case, the Association has no standing to sue in its own right. When determining whether an association has standing, a court conducts the same inquiry as in the case of an individual, determining if the plaintiff alleged such a

personal stake in the outcome of the matter to warrant his invocation of federal court jurisdiction. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982); Allen v. Wright, 468 U.S. 737, 750 (1984). Here, the Association has not alleged a sufficient personal stake. In the complaint, the Association alleged that it and its members had been injured in their business or property. However, during discovery, the Association came forward with no evidence that it had been so injured. In fact, the president of the Association admitted that the Association could not prove that it had lost any membership dues. To the contrary, the president stated that the Association had gained at least one member as a result of filing the current suit, with that member adding $5,000 in annual dues. Thus, the Association has failed to put forth any

evidence that it was injured economically by the MBE statute.

The Association argued that it had suffered a non-economic injury to its "organizational purpose" due to the MBE statute. The Association points to its charter and bylaws in support of this contention. However, as the Supreme Court has noted,

> an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Article III. Insofar as these organizations seek standing based on their special interest [in the subject matter of litigation] their complaint must fail. Since they allege no injury to themselves as organizations, . . . they can establish standing only as representatives of those of their members who have been injured in fact, and thus could have brought suit in their own right.

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40 (1976). In this

case, although the Association alleges that its broad purposes have been violated by the MBE statute, this type of injury is insufficient to support standing. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

B.

Although an organization does not have standing in its own right, it may have representational standing. Warth v. Seldin, 422 U.S. at 511. The Supreme Court set out a three part test for representational standing for organizations in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought

requires the participation of individual members in the lawsuit. Id. at 343; Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 662 (4th Cir. 1989), aff'd sub nom. Wilder v. Virginia Hosp. Ass'n, 496 U.S. ____, 110 S. Ct. 49 (1990).

Thus, we must first determine whether any of the Association's members have the right to sue in their own right. The Association alleged in its complaint that its members had been injured by the statute. However, in its answers to numerous interrogatories on this subject, the Association admitted that: (1) it had no information concerning any member who may have lost a bid or contract or lost profits as a result of the MBE statute; (2) it had conducted no studies to ascertain whether members had been so injured; and (3) it possessed no documents relating to members' lost profits.

In his deposition, the president testified that the Association had no evidence to support its claim that the MBE statute results in higher construction costs. However, the Association relies upon a letter from one of its members, which was referred to in the president's deposition, and was attached as an exhibit thereto. The letter talks generally about problems that the company perceives are associated with the MBE requirements. However, the only mention of any direct economic injury occurs during a discussion of requirements of the City of Baltimore, not of the State of Maryland.

The district court stated that the letter was inadmissible hearsay. In addition, the court noted that the president of the Association had conceded in his deposition that the Association had taken no steps to verify the letter's

claim. Further, the court noted that the Association had no evidence to support the letter's claim. The court did not, as the Association states, merely hold that the letter was inadmissible hearsay. Rather, the court further discussed the letter in light of the contrary testimony of the Association's president. Ultimately, the court concluded that the Association failed to establish that its members could sue in their own right, thus failing the first prong of the Hunt test.

The district court properly found that the letter did not show a sufficient injury in fact. First, several circuits, including the Fourth Circuit, have stated that hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment. See, e.g., Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 973-74 n.8 (4th Cir. 1990);

Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990); Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 570 n.4 (7th Cir. 1989); Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1319 (8th Cir. 1986). Thus, the district court was correct to state that the letter was inadmissible hearsay.

Second, even if we were to hold that the evidence in the letter was admissible, it would not be enough to withstand a summary judgment motion. As the Supreme Court said in Anderson v. Liberty Lobby, Inc.,

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly

> proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

477 U.S. 242, 252 (1986) (quoting Improvement Co. v. Munson, 14 Wall 442, 448, 20 L. Ed. 867 (1872)). The Association stated that it had no data, conducted no studies, and could not come forward with the name of a single firm who would state that it had been injured. In light of this overwhelming evidence of lack of injury to members of the Association, the passing mention of economic harm in a letter of questionable reliability was not enough evidence for a jury to find by a preponderance of the evidence that any member suffered an injury.

The Association relies upon Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990), for support of its claim that the Association's members have

been injured. The Association claims that the case is on all fours with the case at bar. In that case, however, the court found that only the associations whose members had alleged specific harm had standing. Id. at 1283-84. The associations who came forward with evidence that their members had been denied bids, for example, were found to have standing. Id. at 1283. However, those associations who only came forward with evidence that their members "generally bid on these types of projects" did not "provide sufficient details of the injury suffered to meet the Article III requirement." Id. at 1284. In the case at bar, the evidence that the Association came forward with was similarly insufficient to meet the Article III requirement.

In sum, the Association did not meet the first prong of the Hunt three-prong

test for representational standing. In addition, the Association also failed to meet the third prong of the Hunt test. The district court found it unnecessary to reach this issue because of its finding that the Association did not meet the first prong of the Hunt test, but we deem it not amiss to do so.

Prong three of the Hunt test provides that neither the claim nor the relief requested can require the participation of individual members. 432 U.S. at 343. This prong is not met when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests. See Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979). The Eighth Circuit explained this

prong in Associated General Contractors of North Dakota v. Otter Tail Power Co.:

> [T]he claim asserted requires the participation of the individual members of the association. The association is clearly not in a position to speak for its members on the question of whether the [agreement] is violative of antitrust laws. Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members. Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so. . . . It is for the court, not the members of the association, to determine whether their interests require individual representation. Here, in view of the actual and potential conflicts, they clearly do.

Id. at 691 (emphasis added). Like the members of the association in Associated General Contractors, the members of the Association in this case have conflicting

interests. Some of the members of the Association are certified MBEs; they benefit from the continued enforcement of the MBE statute. Other non-minority members of the Association would benefit if the MBE statute were declared unconstitutional. Thus, there are actual conflicts of interest which would require that the individual members come into the lawsuit to protect their interests.

In a similar case, the United States District Court for the District of Utah granted the defendant's motion for summary judgment on the ground that the plaintiff had failed to meet the third prong of the Hunt test. Mountain States Legal Foundation v. Dole, 655 F. Supp. 1424 (D. Utah 1987). The court explained:

> It is entirely conceivable in this case, however, that many members of [the association] would oppose this litigation on ideological grounds or even because they are the

> beneficiaries of the Act's affirmative action provisions. Indeed, at oral argument, counsel for [the association] conceded that the decision to sue is made by the association's Board of Directors rather than by the members as a whole.

Id. at 1431. Similarly, in the present case, the decision to litigate this case was made by the Board of the Association, on which there is no MBE representative. Further, the Board took the unusual position of not telling the members of its decision to litigate until after the suit had already been filed. This secrecy raises suspicion regarding the motives of the Association. Because of the actual conflict of interest and the potential for conflict in this case, the Association has failed to meet the third prong of the Hunt test.

Since the Association failed to meet the first and third prongs of the Hunt test, entry of summary judgment in favor of

Maryland was proper. As a plaintiff, the Association had the burden of proving that it had standing to sue. Because it failed to prove this essential element of its case, the district court correctly ruled that the Association lacked standing.

VI.

To summarize, because of the repeal of the old MBE statute and the subsequent enactment of the new MBE statute by the Maryland legislature, the Association's claim against Maryland was rendered moot. In addition, the district court correctly found that the Association lacked standing to sue under the present facts. Because this case is now moot, we vacate the decision of the district court and remand with instructions to dismiss.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. R-89-2410
STATE OF MARYLAND, et al.	:	
Defendants	:	

: : oOo : :

MEMORANDUM AND ORDER

Pending before the court in the above-captioned case is a motion for summary judgment on jurisdictional issues filed by defendants. The motion has been fully briefed, and the Court has heard oral argument from the parties. For the reasons set forth herein, defendants' motion shall be granted.

I. Introduction

Plaintiff Maryland Highway Contractors Association, Inc. (the "Association") seeks declaratory and injunctive relief against the State of Maryland and several state officials in their official capacities (collectively the "State"), claiming that the State's Minority Business Enterprise ("MBE") statute and regulations violate plaintiff's federal constitutional and statutory rights. The Association asserts that the MBE law unlawfully discriminates against it and its members on the basis of

race and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 2000d.

The parties have completed discovery on jurisdictional issues, and the State now seeks summary judgment on the ground that the Association does not have standing to bring this suit. The State contends that the Association lacks standing because (1) the undisputed facts establish that neither it nor its members have suffered any injury as a result of the State's MBE law, and (2) a conflict of interest exists among the Association's members, thus requiring the participation of individual members in this litigation and disqualifying the Association from bringing this action on their behalf.

II. Standards for Summary Judgment.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure serves

the important purpose of "conserv[ing] judicial time and energy by avoiding unnecessary trial and by providing a speedy and efficient summary disposition" of litigation in which the plaintiff fails to make some minimal showing that the defendant may be liable on the claims alleged. Bland v. Norfolk & Southern R.R. Co., 406 F.2d 863, 866 (4th Cir. 1969). The applicable standards for analyzing a motion for summary judgment under Rule 56 are well-established. The defendant[3/] seeking summary judgment bears the burden of showing the absence of any genuine issue of material fact and that he is entitled to judgment as a matter of law. In determining whether the defendant has sustained this burden, this Court must consider whether, when assessing the evidence in the

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3/The analysis is equally applicable, of course, to motions for summary judgment made by plaintiffs.

light most favorable to the plaintiff, a "fair-minded jury could return a verdict for the plaintiff. . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Pulliam Investment Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). Thus, when the undisputed facts establish that an essential element of a plaintiff's case is missing, summary judgment is appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. at 252; see also Barwick v. Celotex Corp., 736 F.2d 9436, 958-59 (4th Cir. 1984). It is against these standards that the Court shall review defendants' motion.

III. The Statutory and Regulatory Scheme.

The purpose of the MBE statute is to encourage participation by MBEs certified under state law and attempt to provide to MBEs a "fair share" of contracts for the procurement of supplies and services. Md. State Fin. & Procurement Code Ann. § 14-302(a)(1), (2). Specifically, the Department of General Services, the Interagency Committee on School Construction, the Maryland Food Center Authority, the Maryland Stadium Authority, and the University of Maryland system are to structure procurement procedures that "try to achieve the result that a minimum of 10% of [their] total dollar value of procurement contracts is made directly or indirectly from certified minority business enterprises." Id. § 14-302(b)(1). The Department of Transportation is authorized

to "try to achieve" the same goal, but only with respect to procurement contracts in excess of $100,000 on the prime or subcontract level. Id. § 14-302(b)(2).

An MBE is defined as any legal entity that is at least 51% owned or controlled by one or more members of a group "that is disadvantaged socially or economically, including: 1. Alaskan natives; 2. American Indians; 3. Asians; 4. Blacks; 5. Hispanics; 6. Pacific Islanders; 7. women; or 8. physically or mentally disabled individuals." Id. § 14-301(3). The MBE statute directs the Maryland Board of Public Works to adopt regulations and procedures to achieve the goals of the statute. The regulations adopted include a requirement that each contract solicitation set forth expected degree of MBE participation; a requirement that the affected state agency provide a list of

certified MBEs to each prospective contractor; provisions that ensure that uniformity of requests for bids; provisions concerning the timing of requests and submissions of bids on subcontracts; and provisions that ensure the State not be fiscally disadvantaged by an inadequate response by MBEs to requests for bids. Id. § 14-303(b); Code of Maryland Regulations (COMAR) 21.11.03.01 et seq.

The regulations adopted by the Board of Public Works also set forth the circumstances under which MBE participation may be waived. COMAR 21.11.03.11. To receive a waiver, the contract bidder or offeror must make a reasonable demonstration that MBE participation is not obtainable or is not obtainable at a reasonable price, and the state procurement agency must decide that the public interest would be served by a waiver. Id.

IV. Standing.

Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." Article III does not provide the federal courts with the unconditional authority to determine the constitutionality of legislative or executive acts. Valley Forge College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 1471 (1982). Rather, federal judicial power "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Id. at 471 (quoting Chicago & Grand Trunk RR. Co. v. Wellman, 143 U.S. 339, 345 (1982)).

As an incident to the "case or controversy" requirement of Article III, a litigant is required to have "standing" to challenge the action sought to be

adjudicated in federal court. The question of standing is the threshold question in every federal case, as it determines the power of the court to entertain the suit. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). While this inquiry involves constitutional limitations, it encompasses prudential considerations as well. As the Supreme Court aptly stated, "it has not always been clear in the opinions of [the Supreme] Court where particular features of the 'standing' requirement have been required by Art. III ex proprio vigore, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." Valley Forge College, 454 U.S. at 471.

At a minimum, however, Article III requires a plaintiff "[to] to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). the injury must be "distinct and palpable," Warth v. Seldin, 422 U.S. at 501, not "abstract" or "conjectural" or "hypothetical." Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983). Moreover, "[t]he injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." Allen v. Wright, 468 U.S. 737, 751 (1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 138, 41 (1976)).

The plaintiff in this instant action is an association. An association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Warth v. Seldin, 422 U.S. at 511. However, the association, as with any other plaintiff, 'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. at 750. In addition, an association may have standing solely as the representative of its members. Warth v. Seldin, 422 U.S. at 511. Associational standing "does not eliminate or attenuate the constitutional requirement of case or controversy." Id. The association must assert that the members "are suffering immediate or threatened injury as a result

of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Id.

A. Plaintiff's standing to sue in its own right.

As previously stated, an organization may have standing in its own right if the organization can demonstrate injury to itself that is causally linked to the defendant's alleged unlawful conduct. the State contends that the Association has failed to establish such an injury and thus lacks standing to sue in its own right. The defendants' challenge to plaintiff's standing is not based solely on the pleadings. Rather, the parties have conducted extensive discovery on the issue of standing. The State has propounded interrogatories and requests for production of documents relating to possible injuries suffered by the Association and/or its members as a result of the MBE statute. In

addition, on October 31, 1989, the State deposed Mr. Robert E. Latham, the Executive Director of the Maryland Highway Contractors Association. The State contends that Mr. Latham's answers at his deposition and to the interrogatories and requests for production propounded by the State clearly reveal that the Association have suffered no injury in fact and thus has no standing in its own right to challenge the MBE statute.

One of the injuries alleged in the Association's complaint is that "Plaintiff and its members have been injured in their business or property as the result of the racial discrimination currently being practiced by the State of Maryland in the award of construction contracts." Complaint para 40. The Association, however, has come forward with no evidence establishing any economic injury to its

business or property. Indeed, at his deposition, Mr. Latham conceded that only "sheer speculation" supported the Association's claim that the State's MBE law caused the Association to lose membership dues. See Latham Dep. Tr. at 54. In fact, Mr. Latham testified that as a result of bringing this suit, the Association gained at least one member who contributes approximately $ 5000 a year in membership dues. See Latham Dep. Tr. at 30, 54. Thus, the existence of the MBE statute actually resulted in an increase in the Association's membership and membership contributions.

Having failed to demonstrate any economic injury as a result of the MBE statute, the Association attempts to establish an injury to its "organizational purpose" as its basis for standing. The Association has identified the following

purposes listed in its Articles of Incorporation as having been frustrated by the MBE statute:

> (5) To seek correction of injurious, discriminatory or unfair business methods practiced by or against those engaged in the construction business;
>
> (6) To place the business risks assumed by those engaged in the construction industry as nearly as possible on a parity with the risks assumed by other industries of production;
> (7) to eliminate waste and reduce construction costs through research and through cooperation with other agencies of construction.
>
> (7) To eliminate waste and reduce construction costs through research and through cooperation with other agencies of construction.

The Association contends that the seventh purpose is hindered by the MBE statute because "studies . . . have shown that these types of programs foster waste. And . . . have increased the cost of construction." Latham Dep. Tr. at 44.

When pressed for evidence supporting this assertion, the Association admitted that it has none. Id. at 45-46. Similarly, the Association contends that the sixth organizational purpose is frustrated because the construction industry "has to bear the brunt of this particular issue . . . ." Yet again, the Association has produced no evidence supporting this claim.[4/]

4/The Association also contends that the purpose set forth in Article II, Section B of the Association's Bylaws is frustrated by the MBE statute because the statute results in increased construction costs. Article II, Section B is as follows:

> B. Represent its members in such a manner as to aid in the development of the best possible transportation system, in the interests of fair cost to the tax payer and fair return to the contractor and supplier.

Mr. Latham admitted, however, that the Association has no facts or evidence supporting this claim. Latham Dep. Tr. at 49-51.

During oral argument, counsel for plaintiff argued that the Association has standing in its own right because "[this lawsuit] is within the broad domain of [the Association's] organizational rights, and [the Association has] been injured in that regard."

Hearing Tr. at 31. The Association appears to contend that because one of the purposes of this organization is to correct "discriminatory or unfair business methods," and because the MBE statute is alleged to be "discriminatory and unfair," the Association therefore has suffered an injury and can bring this suit.

An organization's charter or bylaws cannot create standing. The mere existence of an allegedly unconstitutional statute that is somehow adverse to an organization's charger or bylaws does not create an injury. Otherwise, an organization could

challenge the constitutionality of any statute merely by amending its charter or bylaws. Such a situation would permit individuals to challenge the constitutionality of statutes with nothing more than a generalized grievance, thereby completely undermining the concept of standing and the requirements of Article III. "[A] mere 'interest in a problem,' no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to establish standing. Sierra Club v. Morton, 405 U.S. 727, 739 (1972); see Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976) ("an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III") merely point to "broad purposes" of the organization and

stating that a statute violates those broad purposes without showing any concrete injury is nothing more than an abstract, generalized interest.

The Court does not doubt that the Association has a genuine interest in the future of the MBE statute. However, having failed to demonstrate any economic or non-economic injury to itself as a result of the challenged statute, the Association's constitutional challenge represents precisely the type of grievance this Court lacks authority to redress. Accordingly, the Court finds that the Association does not have standing in its own right to challenge the MBE statute.

B. Plaintiff's Standing to on Behalf of Its Members.

The only other possible standing theory upon which plaintiff might rely to challenge the constitutionality of Maryland's MBE law is that it is acting in

a representative capacity and suing on behalf of its members. See Warth v. Seldin, 422 U.S. at 511. To establish associational standing, the plaintiff must satisfy each of the following three conditions: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). Thus, the first inquiry is whether the Association's members have standing to sue in their own right. to establish that its members have standing, the Association must demonstrate that the members have suffered injury in fact as a result of the MBE statute.

The Association virtually admits that it cannot demonstrate that it members have suffered any economic injury due to the MBE statute. In its answer to interrogatories, the Association states that it has no information concerning any member who may have lost a bid or a contract or lost profits as a result of the MBE statute. See Plaintiff's Response to Request No. 6. Nevertheless, the Association claims its members have been injured because future economic injury is possible. See Plaintiff's Answer No. 6 to Defendant's Interrogatories ("Association members may be direct victims of discrimination sanctioned by the MBE statute to the extent that they may be denied opportunities because of their race or sex.") (emphasis added). Such sheer speculation is certainly an insufficient basis to justify

standing on the part of the Association to bring this action.

The Association maintains, however, that "compliance with the MBE statute requires that members expend time, money and resources in searching out, contracting with, or justifying failure to contract with, MBEs." Plaintiff's Answer to Interrogatory No. 6. The Association has failed to produce any evidence in support of this statement. During his deposition, Mr. Latham admitted that the Association has no "empirical data or evidence to support a claim that the MBE law in Maryland results in higher construction costs[.]" Latham Dep. Tr. at 45. Indeed, the sole "authority" for this assertion is a letter the Association received from the McLean Contracting Company setting forth problems that the McLean Contracting Company had with MBEs. At the outset, the

letter is not admissible evidence and thus cannot be used to support the Association's claim of standing. Moreover, Mr. Latham conceded that the Association has no evidence to support the letter's claim of increased costs and has made no effort to substantiate that claim. See Latham Dep. Tr. at 139-40.

As a final attempt to establish economic injury on the part of its members, the Association asserts that as a result of the MBE statute, its members are subjected to suit by non-minority subcontractors for making racial preferences. Hearing Tr. at 34. The Association even goes as far as to say that these potential suits could be brought under the Civil Rights Act, 42 U.S.C. § 1983 and § 1985. Id. In 1978 the Maryland General Assembly first enacted legislation directing certain departments to structure its procurement policies so

that a minimum of ten percent of its materials, supplies, equipment and services, including construction, were purchased from MBEs. See Act of May 16, 1978, ch. 575, 1978 Md. Laws 1892. The plaintiff's failure to cite a single instance in which a contractor has been sued by a non-minority subcontractor for racial discrimination leads the Court to believe that no such suit has occurred within the twelve years a Maryland MBE statute has been in existence. Thus, suit by a non-minority subcontractor for racial discrimination hardly appears to be threat of actual injury. Rather, this theory is merely an attempt on the part of plaintiff's counsel to invent some economic injury suffered by the Association's members as a result of the MBE statute in

the absence of any genuine economic injury.[5/]

While the Court recognizes that a relatively small economic injury may suffice to confer standing, the reality is that the Association has not produced any evidence of even a minute economic injury suffered by it's members as a result of the MBE statute. At oral argument, counsel for

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5/Plaintiff also cites The Associated General Contractors of Connecticut, Inc. v. City of New Haven, ___ F.R.D. ___ (D. conn. March 10, 1990) in support of its assertion that its members have suffered injury in fact. In The Associated General Contractors, the Connecticut district court found that the plaintiff-association had standing to challenge New Haven's set-aside program because some of its members were non-minority subcontractors who could not compete for the set-aside portions of contracts. The court found that such deprivation was sufficient injury in fact to confer standing on those members to sue in their own right. Without expressing any opinion as to whether such a deprivation actually constitutes injury in fact, the court disregards this case because the Association has not established that it represents non-minority subcontractors who are denied the opportunity to compete for set-aside portions of contracts.

plaintiff mentioned for the first time forms that needed to be filled out pursuant to the MBE statute and regulations, telephone calls that at times had to be made, and the cost of rewriting bids to include MBEs. Again, however, the Association has produced no evidence documenting these alleged costs.

Having realized its inability to establish economic injury to its members, the Association has focused primarily on non-economic injury to its members as the basis for conferring standing. The Association contends that its members have been injured and thus have standing to bring this action because they must participate in the MBE program. Essentially, the Association contends that its members are injured by the mere "fact that employers or companies under this law have to comply with laws that force racial

preferences upon them . . . ." See Hearing Tr. at 33-35.

On of the cases plaintiff cites in support of its theory is Pennell v. City of San Jose, ___ U.S. ___,, 108 S.Ct. 849 (1988). Pennell involved a challenge to a rent control ordinance enacted by the City of San Jose which permitted a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. The plaintiffs in Pennell were Richard Pennell, an owner and lessor of 109 rental units in the city of San Jose, and the Tri-County Apartment House Owners Association, which represents owners and lessors of real property located in San Jose. Although the property owned by Pennell and the members of the association was subject to the Ordinance, the plaintiffs did not allege that either

Pennell or any member of the association had "hardship tenants" who might trigger the Ordinance's hearing process, nor did they specifically allege that they had been or will be aggrieved by the determination of a hearing officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship. Id. at 855. Thus, the defendant contended that the plaintiffs lacked standing.

Unlike this instant action, the determination as to whether the plaintiffs in Pennell had standing was based solely on the pleadings. Thus, accepting as true plaintiffs' statement in the complaint that their properties were subject to the Ordinance, the Court found that it was not unadorned speculation "to conclude that the Ordinance will be enforced against members of the Association. Id. the Court then held that:

> The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, [was] a sufficient threat of actual injury to satisfy Art. III's requirement that '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result to the statute's operation or enforcement." Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979).

Id.

In Pennell, the Court found that the plaintiffs had standing to challenge the statute because, as a result of being subject to the Ordinance, there was "a sufficient threat of actual injury." The court did not find, as plaintiff suggests, that "the mere fact that [the members] are operating under [an] unconstitutional law or an arguably unconstitutional law create[d] standing in that association." Hearing Tr.. at 23. Here, the members of

the Association are undoubtedly subject to the MBE statute. However, the Association has failed to demonstrate that the members have suffered any kind of actual injury, or even suffer any threat of actual injury, as a result of being subject to the MBE statute.

In further support of its theory that mere participation in the MBE program confers standing, the Association relies on several cases which the court finds completely inapposite to the facts of this instant action.[6/] In each of these cases, the plaintiffs had clearly suffered a distinct and palpable injury as a result of

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6/These cases were cited by the Association in its brief and during oral argument and include the following: UAW v. Brock, 477 U.S. 274 (1986); Super Tire Engineering Company v. McCorkle, 416 U.S. 115 (1974); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Abingdon School District v. Schempp, 374 U.S. 203 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 360 U.S. 240 (1959).

the challenged statute. Indeed, the only case cited by the Association in support of its standing theory where the injury to the plaintiffs could be construed to be similar to the injury allegedly suffered by the Association's members, is a case in which the issue of standing was never addressed. In Michigan Road Builders Association v. Milliken, 571 F. Supp. 173 (E.D. Mich. 1983); rev'd on other ground, 834 F.2d 583 (6th Cir. 1987); aff'd, 109 S.Ct. 1333 (1989), the plaintiffs were (1) several non-profit associations whose members were construction firms, contractors and suppliers who did business in Michigan and (2) various profit corporations who either had received or had sought contracts with the State of Michigan. The plaintiffs brought suit to challenge the constitutionality of a statute establishing minority set-aside program. the plaintiffs

did not contend that they had been "(1) subjected to discrimination in the award of any particular contract or (2) denied the opportunity to bid on any contract because of [the challenged statute]." Michigan road Builders, 571 F. Supp. at 175. The district court addressed the merits of the claim without ever addressing the issue of standing.

Although it appears that the plaintiffs in Michigan Road builders and the plaintiff in this instant action are similarly situated, the fact remains that the Michigan district court never addressed the issue of standing. Thus, this Court has no idea on what basis the Michigan district court found standing, or even whether the court considered the possibility that the plaintiffs lacked standing. It is interesting to note that the only case that the Association has

found that arguably supports its theory of standing is one in which the issue of standing was never discussed. This Court will not be persuaded by silence.

The court, however, is persuaded by the Fourth Circuit's recent decision regarding a plaintiff's standing to challenge a statute similar to Maryland's MBE statute. In Carpenter v. Barnhart, No. 88-3578 (4th Cir. Jan. 16, 1990), the Fourth Circuit, in an unpublished opinion, addressed whether the plaintiffs, a contractor and his contracting firm, had standing to challenge North Carolina's Disadvantaged Business Enterprises ("DBE") statute. Plaintiffs alleged that the North Carolina set-aside program was a racial quota which denied them the opportunity for meaningful participation in the bidding process employed by the state to award

contracts for the construction of public highway.

The Fourth Circuit found that the plaintiffs lacked standing the bring the constitutional challenge because they failed to show any injury caused by the DBE program. Id. at 6. The plaintiffs did not regularly bid on North Carolina highway construction projects and "never identified any specific contracts that were denied him due to the DBE program." Id. at 8. The court denied plaintiffs standing based on "their loss of opportunity to contract with a government agency or department," finding that such a claim "amounts to no more than an assertion of hypothetical loss of business." Id. at 9. Moreover, the court found plaintiffs' contention that the DBE program excessively burdened plaintiffs because they were specialty contractors equally unavailing because "plaintiffs once

again failed to bring forth concrete evidence of injury to them as specialty contractors." Id at 9.

The Association attempts to distinguish the Carpenter case by asserting that it involved a plaintiff whose claim was a personal "as applied" challenge to a set-aside program while its claim is a "facial challenge" by an association to a program in which its members participate regularly. It appears that the Association believes that standing requirements vary depending on whether the plaintiff brings a facial challenge or a personal "as applied" challenge to a statute. Essentially, the Association contends that because it attacks the facial validity of the MBE statute, it is somehow relieved of Article III's injury in fact requirements. Not surprisingly, the Association cites no case in support of this proposition.

Mere participation in a program does not confer standing upon an individual or an association to attack the facial validity of the statute creating that program. The program must result in some injury to the participant before he or she can sustain a suit in federal court challenging the constitutionality of the statute. Here, the complete absence of any real, concrete injury to the Association or to its members leaves the court with no "controversy" to adjudicate and renders the court without authority to rule on the merits of the Association's constitutional claim.

Requiring the Association to demonstrate injury to itself or to its members as a result of the MBE statute is not an insurmountable task. According to the Association, however, its members are not willing to step forward and claim that

they have suffered any economic injury. See Hearing Tr. at 21-22. Moreover, the Association failed to conduct any studies supporting its theory that the MBE statute results in increased costs and decreased efficiency. One of the purposes of the Article III standing requirement is to ensure that a strong advocate is before the Court. The Association's failure to establish any distinct and palpable injury suffered by either itself or its members reveals that it is not a proper plaintiff to challenge the MBE statute. Having determined that the Association has failed to establish injury in fact, the Court does not reach the State's second argument that a conflict of interest exists between the Association's members.

Accordingly, it is this 19th day of June, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion for summary judgment is GRANTED;

2. That the Clerk of the Court shall mail a copy of this Memorandum and Order to all counsel of record.

Norman P. Ramsey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE MARYLAND HIGHWAYS CONTRACTORS ASSOCIATION, INC.,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. R-89-2410
STATE OF MARYLAND, et al.	:	
Defendants	:	

: : o0o : :

JUDGMENT

This case has been remanded to this Court from the United States Court of Appeals for the Fourth Circuit. In accordance with that court's decision in No. 90-3102, dated May 20, 1991, this Court's June 19, 1990 Memorandum and Order is vacated as moot; plaintiff's complaint

is dismissed as moot; and each party shall bear its own costs.

SO ORDERED this ____ day of _____, 1991.

_____
Norman P. Ramsey
United States District Judge

Laws of Maryland, Chapter 708 (House Bill 1540)

Preamble

WHEREAS, In 1978 the General Assembly of Maryland enacted Chapter 575, creating a Minority Business Enterprise program as a remedy for past discrimination in the expenditure of State public contract dollars and, in 1983, enacted Chapter 193, reaffirming its conclusion that the State's Minority Business Enterprise program was necessary and should be continued; and

WHEREAS, In January, 1989, the Supreme Court of the United States, in City of Richmond v. J.A. Croson Co. held that State and local minority business programs should be narrowly tailored to remedy the effects of past discrimination; and

WHEREAS, The Governor and the Board of Public Works authorized the State to commission the firm of Coopers and Lybrand

to conduct a Minority Business Utilization Study and the firm has submitted the results of its study to the State; and

WHEREAS, That report and this implementing legislation have come before the General Assembly of Maryland, hearings have been held with respect to this matter, and the General Assembly has carefully considered the report, the proposed legislation, and all of the evidence before it; and

WHEREAS, There is a history in Maryland of discrimination against women, Blacks, and Hispanics which has resulted in businesses owned or controlled by them receiving disproportionately low shares of State public contract expenditures and, despite the existence of the State's Minority Business Enterprise program, the effects of past and current discrimination are continuing to impede businesses from

obtaining a fair share of both private and public contract dollars; and

WHEREAS, In Maryland and in the marketplace for State public contracts, businesses owned or controlled by Asians, Hispanics, and women are underutilized as State contractors and this disparity and other evidence demonstrates that this underutilization is the product of current, continuing racial discrimination against such persons in private and public contracting; and

WHEREAS, The General Assembly finds, on the basis of oral and written testimony, that there is a history in Maryland of discrimination against American Indians which has resulted in businesses owned or controlled by American Indians not receiving business in both the public and private sector and, but for the existence of the State's Minority Business Enterprise

Program, American Indians would continue to face serious economic disadvantage in their business ventures; and

WHEREAS, The Maryland Minority Business Enterprise program has not eradicated the impact of past discrimination or precluded ongoing discrimination against such businesses; and

WHEREAS, Continuation of a narrowly tailored program, meeting the requirements of Croson, is essential to the ultimate achievement of a marketplace in which minority firms will not be subject to discrimination and, without aid of such a program, will obtain a fair share of private and public contract expenditures; and

WHEREAS, Race and sex neutral means of assisting minority firms exist and have been attempted, but do not effectively eradicate the effects of past discrimina-

tion or preclude ongoing discrimination against minority business, and have no substantial likelihood of achieving the goal that these businesses will obtain a fair share of State public contract expenditures in the absence of a minority business program; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Maryland State Finance and Procurement Code Annotated §§ 14-301 through 14-303 [as amended by 1990 Md. Laws Ch. 708; deleted language lined out and added language underscored]:

§ 14-301. Definitions.

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Certification. -- "Certification" means the determination that

a legal entity is a minority business enterprise for the purposes of this subtitle ~~through a procedure that:~~

~~(1) the Department of Transportation uses; or~~

~~(2) the State Minority Business Certification Council recommends.~~

(c) Certification agency. -- "Certification agency" means the agency designated by the Board of Public Works under § 14-303(b) of this subtitle to certify and decertify minority business enterprises.

(d) Certified minority business enterprise. -- "Certified minority business enterprise" means a minority business enterprise that holds a certification.

(e) Designated unit. -- "Designated unit" means:

(1) the Department of General Services;

(2) The Department of Transportation;

(3) the Interagency Committee on School Construction;

(4) the Maryland Food Center Authority;

(5) the Maryland Stadium Authority;

(6) the University of Maryland System;

(7) for a procurement under Title 3, Subtitle 4 of this article, the Department of Budget and Fiscal Planning; and

(8) for a procurement in connection with construction of a State correctional facility under § 12-107 of this article, the Department of Public Safety and Correctional Services:

(f) Minority business enterprise. -- (1) "Minority business enterprise" means any legal entity, except a joint venture, that is:

(i) organized to engage in commercial transactions; and

(ii) at least 51% owned and controlled by 1 or more individuals who are members of a group that is disadvantaged socially or economically, including:

~~1. Alaskan natives;~~

1. ~~2.~~ American Indians;

2. ~~3.~~ Asians;

3. ~~4.~~ Blacks;

4. ~~5.~~ Hispanics;

~~6. Pacific islanders;~~

5. ~~7.~~ women; or

6. ~~8.~~ physically or mentally disabled individuals.

(2) "Minority business enterprise" includes a not for profit entity organized to promote the interests of physically or mentally disabled individuals.

§ 14-302. Procurement from minority businesses.

(a) In general. -- Except for leases of real property, each unit shall structure procurement procedures to:

(1) encourage participation in the process by certified minority business enterprises; and

(2) try to provide a fair share of procurement contracts to certified minority business enterprises.

(b) Goal in structuring procedures. -- (1) Except for leases of real property and except as provided in paragraph (2) of this subsection, each designated unit shall structure procurement procedures, consistent with the purposes of this subtitle to try to achieve the result that a minimum of 10% of the designated

unit's total dollar value of procurement contracts is made directly or indirectly from certified minority business enterprises.

(2) In procurement for construction, the Department of Transportation shall:

(i) structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve participation by certified minority business enterprises in the amount of at least 10% of the dollar value of procurement contracts in excess of $100,000 on the prime or subcontract level; and

(ii) consider the practical severability of the construction projects.

(c) Conflicts with federal requirements. -- (1) The provisions

of §§ 14.301 (e) and 14-303 of this subtitle and subsections (a) and (b) of this section are inapplicable to the extent that any of the primary procurement units determines the provisions to be in conflict with any applicable federal program requirement.

(2) The determination under this subsection shall be included with the report required under § 14-305 of this subtitle.

§ 14-303. Regulations by Board

(a) In general. -- (1) In accordance with Title 10, Subtitle 1 of the state Government Article, the Board shall adopt regulations consistent with the purposes of this Division II to carry out the requirements of this subtitle.

(2) The regulations shall establish procedures to be followed by units, prospective contractors, and successful bidders or offerors to maximize notice to, and the opportunity to participate in the procurement process by, a broad range of minority business enterprises.

(b) Required regulations. -- These regulations shall include:

(1) provisions designating one agency to certify and decertify minority business enterprises for all units through a single process that meets applicable federal requirements;

(2) a requirement that the solicitation document accompanying each solicitation set forth the expected degree of minority business

enterprise participation based, in part, on:

(i) the potential subcontract opportunities available in the prime procurement contract; and

(ii) the availability of certified minority business enterprises to respond competitively to the potential subcontract opportunities;

(3) a requirement that the unit provide a current list of certified minority business enterprises to each prospective contractor;

(4) provisions to ensure the uniformity of requests for bids on subcontracts;

(5) provisions relating to the timing of requests for bids on

subcontracts and of submission of bids on subcontracts;

(6) provisions designed to ensure that a fiscal disadvantage to the State does not result from an inadequate response by minority business enterprises to a request for bids;

(7) provisions relating to any circumstances under which a unit may waive obligations of the contractor relating to minority business enterprise participation; and

(8) other provisions that the Board considers necessary or appropriate to encourage participation by minority business enterprises and to protect the integrity of the procurement process.

CODE OF
MARYLAND REGULATIONS (COMAR)

TITLE 21
STATE PROCUREMENT REGULATIONS
Subtitle 05 Procurement Methods

Chapter 08 Mandatory Written Solicitation Requirements

* * *

.04 Minority Business Enterprise Participation Goal.

An MBE subcontract participation goal is a mandatory provision for each solicitation for contracts that will provide MBE subcontract opportunities under COMAR 21.11.03 except small procurements made under COMAR 21.05.07. The language may be varied but shall contain the following information:

"An MBE subcontract participation goal of -- percent of the total current amount has been established for this procurement. By submitting a response to this solicitation, the

bidder or offeror agrees that this amount of the contract will be performed by minority business enterprises."

SUBTITLE 11 SOCIOECONOMIC POLICIES

Chapter 03 Minority Business Enterprise Policies

.01 General - purpose

This chapter provides that maximum contracting opportunities be extended to certified Minority Business Enterprises, and establishes that:

A. Each designated department as defined in Regulation .03B(3), below, except the Department of Transportation as to construction contracts, shall structure its procedures for procuring supplies, services, maintenance, construction, construction-related services, architectural

services, and engineering services to attempt to achieve the result that a minimum of 10 percent of the total dollar value of these procurements is made directly or indirectly from certified minority business enterprises;

B. The Department of Transportation shall structure its procurements for procuring construction to attempt to achieve participation by certified minority business enterprises, in the amount of at least 10 percent of the dollar value of contracts in excess of $100,000 on the prime or subcontract level; and

C. Each procurement agency shall structure its procurement procedures to encourage a fair participation in the State procurement process by

certified minority business enterprises.

* * *

.09 A [omitted]

B. MBE Procurement Methods.

(1) Direct Solicitation. If known certified MBEs can provide the entire contract, then the certified MBEs may be solicited directly in accordance with Regulation .08A as part of the solicitation process being employed for the business community in general. The solicitation and solicitation notice shall comply with COMAR 21.05.08.03.

(2) MBE Subcontract Method.

(a) Notwithstanding whether a direct solicitation is made under § B(1), above, all Department of Transportation construction contracts in excess of $100,000 and

all other construction contracts in excess of $50,000, shall contain a certified MBE subcontract participation goal, expressed as a percentage of the dollar value of the contract, that should be attempted to be subcontracted to certified MBEs. A designated department or procurement agency may establish a certified MBE subcontract goal for a particular construction contract of $50,000 or less, or any supply, maintenance, service, construction-related service, architectural service, or engineering service contract.

(b) Solicitation Content. Each solicitation identified by a designated department or procurement agency as having subcontract opportunities shall contain the

clauses required by COMAR 21.05.08.03 and .04.

(c) A bidder or offeror shall submit with its bid or proposal a completed certified MBE utilization affidavit on a form provided by the appropriate designated department or procurement agency.

(d) The names of prime contractors requesting or purchasing solicitation documents for construction contracts shall be made available on request to any certified MBEs whose specialty suggests an interest in subcontracting.

(e) Each prime contractor given solicitation documents as part of a procurement under the MBE subcontract method, and who does not have an updated Central Directory shall be given, upon request, one

copy of the Directory or the pertinent portions for purposes of soliciting subcontract quotations, bids, or offers from certified MBEs.

(3) Combination Procurement Method.

(a) A combination of direct solicitation and the MBE subcontract methods, pursuant to § B(1) and (2), may be used when the designated department or procurement agency decides this method will be most likely to achieve the greatest degree of certified MBE participation.

(b) The solicitation documents shall comply with COMAR 21.05.08.03 and .04.

(4) Pre-bid and Pre-proposal Conferences. When pre-bid or pre-proposal conferences are held,

the designated department or procurement agency shall explain the certified MBE subcontracting goal if applicable, the MBE provisions of the solicitation, the documentation required and its relationship to the determinations that will be made in connection with the evaluation process.

* * *

.10 Contract Award

A. General.

(1) In the event of tie bids, or of offers in which the evaluation of technical and price proposals are essentially equal, a designated department or procurement agency may award the contract, in accordance with COMAR 21.05.02.14 or 21.05.03. 03C(6), as applicable, in

order to obtain certified MBE participation.

(2) In exercising its delegation or control authority over contracts, the Department of General Services and the Department of Budget and Fiscal Planning may require all determinations under this regulation and Regulation .11 to be made before execution of a contract, or approval by the control agency, or both.

(3) An MBE prime contractor responding to the solicitation shall, if awarded the contract, accomplish an amount of work not less than the MBE subcontract goal with his own work force, MBE subcontractors, or both in combination. The documentation requirements of § A(5), below, are applicable only if MBE subcontractors are to be utilized in the

performance of the contract. The MBE prime contractor shall, however, be certified or submit an MBE affidavit and apply to be certified in accordance with § B(4), below.

(4) Each bid or offer submitted in response to this solicitation shall be accompanied by a completed MBE utilization affidavit, on forms provided by the procurement agency, whereby the bidder or offeror acknowledges the MBE participation goal and commits to make a good faith effort to achieve the goal.

(5) Documentation. The following documentation shall be considered as part of the contract, and shall be furnished by the apparent successful bidder or offeror to the procurement officer within 10 working days from notification that

he is the apparent successful bidder or offeror or within 10 working days following the award, whichever is earlier. If the contract has been awarded and the following documentation is nor furnished, the award shall be null and void.

(a) A completed schedule of participation naming each MBE who will participate in the project that describes the:

(i) contract items to be performed or furnished by the MBE and the proposed timetable for performance; and

(ii) Agreed prices to be paid to each MBE for the work or supply.

(b) If the apparent successful bidder or offeror is unable to achieve the contract goal

for MBE participation, the apparent successful bidder or offeror may submit instead of or in conjunction with the schedule of participation a request in writing for a waiver as provided in Regulation .11.

(c) An MBE subcontractor project participation statement signed by both the bidder or offeror and each MBE listed in the schedule of participation which shall include:

(i) A statement of intent to enter into a contract between the prime contractor and each subcontractor if a contract is executed between the procurement agency and the prime contractor, or if the prime contract has been awarded, copies of the subcontract agreement or agreements; and

(ii) The amount and type of bonds required of MBE subcontractors, if any.

(d) A completed and signed MBE affidavit for any MBE prime contractor and for each MBE identified in the schedule for MBE participation provided that the bidder, offeror, or subcontractor is not already certified by the State Minority Business Certification council or the Department of Transportation under COMAR 21.11.03.15 or 21.11.03.16.

(e) An affidavit completed and signed by the prime contractor stating that, in the solicitation of subcontract quotations or offers, MBE subcontractors were provided not less than the same information and amount of time to

respond as were non-MBE subcontractors, and that the solicitation process was conducted in such manner as to otherwise not place MBE subcontractors at a competitive disadvantage to non-MBE subcontractors.

(f) Any other documentation considered appropriate by the designated department or procurement agency to ascertain bidder or offeror responsibility in connection with the contract MBE participation goal.

(g) The contractor, by submitting his bid or offer, consents to provide that documentation requested by the designated department or procurement agency pursuant to COMAR 21.11.03.13, and to provide right of entry at any reasonable time for purposes of the State's represen-

tatives verifying compliance with the MBE subcontractor requirements.

B. Contracts Involving Subcontracts.

(1) A contract involving subcontracts shall be subject to the designated department's or procurement agency's concluding that the apparent successful bidder or offeror meets the applicable certified MBE participation provisions contained in the solicitation.

(2) The apparent successful bidder or offeror shall within 10 working days from the date of award of the contract or notification that it is the apparent successful bidder or offeror, whichever is earlier, submit the documentation described by § A(5).

(3) Nothing in this regulation is intended to preclude the award of a contract conditionally upon receipt of the documentation specified in § B, above.

(4) Whenever an uncertified minority business is identified for contract award, or in the schedule for subcontract participation required under § A(5) (a), the designated department or procurement agency shall forward the affidavit of the minority business to the appropriate certification entity for certification consistent with Regulations .15 and .16 of this chapter. A contract may be awarded notwithstanding the pendency of certification. The certification entity shall notify promptly the designated department or procurement agency of its disposi-

tion. In the event of an unfavorable disposition, the designated department or procurement agency shall include that fact as part of its annual report and may not, in the future, treat that business entity as an MBE until it is certified.

C. If a designated department or procurement agency determines that the apparent successful bidder or offeror has not complied with the certified MBE subcontract participation contract goal, and has not obtained a waiver in accordance with Regulation .11, below, or if the bidder or offeror fails to submit the documentation required by the solicitation, the procurement officer, upon review by the Office of the Attorney General and approval of the agency head having jurisdiction over the

contract, may reject the bid or offer or cancel the award of the contract. The reasons for this action shall be specified in writing and mailed or delivered to the bidder or offeror.

.11 Waiver

A. If, for any reason, the apparent successful bidder or offeror is unable to achieve the contract goal for certified MBE participation, the bidder or offeror may request, in writing, an exception to the goal with justification to include the following:

(1) A detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs in order to increase the likelihood of achieving the stated goal;

(2) A detailed statement of the efforts made to contact and negotiate with certified MBEs including:

(a) The names, addresses, dates, and telephone numbers of certified MBEs contacted, and

(b) A description of the information provided to certified MBEs regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

(3) As to each certified MBE that placed a subcontract quotation or offer that the apparent successful bidder or offeror considers not to be acceptable, a detailed statement of the reasons for this conclusion; and

(4) A list of minority subcontractors found to be unavailable.

This list should be accompanied by an MBE unavailability certification signed by the minority business enterprise, or a statement from the apparent successful bidder or offeror that the minority business refused to give the written certification.

B. A waiver of a certified MBE contract goal may be granted only upon a reasonable demonstration by the bidder or offeror that certified MBE participation was unable to be obtained or was unable to be obtained at a reasonable price and if the agency head or designee may consider engineering estimates, catalogue prices, general market availability, and availability of certified MBEs in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substan-

tiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

C. An agency head may waive any of the provisions of Regulations .09-.10 for a sole source, expedited, or emergency procurement in which the public interest cannot reasonably accommodate use of those procedures.

D. When a waiver is granted, except waivers under § C, one copy of the waiver determination and the reasons for the determination shall be kept by the MBE Liaison Officer with another copy forwarded to the Office of Minority Affairs.

McLEAN CONTRACTING COMPANY

July 6, 1988

The Maryland Highway Contractors
Association, Inc.
Suite 707, Empire Towers
7300 Ritchie Highway
Glen Burnie, MD 21061

Gentlemen:

As requested, we are pleased to provide you with some of the problems we have encountered and the causes thereof in dealing with the Minority Business Enterprise Program.

The basic problem of the majority of minority subs we have dealt with is that the firms are not operated by full-time business and/or financially educated or experienced people. Usually the principals have construction experience but their business/finance expertise comes from part-time lawyers or family members. Although we strongly believe that the majority of minority firms are sincere and want to

perform well, the problem is obvious. Without a basic business/finance background they are in trouble from the start.

Minority firms are generally undercapitalized. Therefore, the firms need constant financing from the prime contractor. Many times, at the beginning of a project, the minority firm confronts the prime contractor with an ultimatum of either providing financing or they cannot perform the job. The types of financing are listed below:

1. Advances

2. More frequent partial payments than what the Contract requires

3. Weekly payroll payments

4. Guarantees to material and/or equipment suppliers

We will assist firms with the financing above, except for advances, because it is our obligation under the affirmative action. However, we naturally want to

protect ourselves the best way we can from being caught in a position where we have paid more to a sub than the amount of work performed. To protect ourselves we will demand certified payrolls before a weekly payroll is issued. Unfortunately, in some cases, this did not prevent non-payment to the employees and in other cases non-payment of union dues. In each instance our payment bond was attacked resulting in a duplicate payment for the same service. We will guarantee material suppliers by providing payment under a joint check after material has been delivered and payment authorized by the sub. In addition, we require the sub to come to our office to endorse the check, then we forward it to the supplier directly. Prior to this procedure joint checks were mailed to the subs and in some cases the checks were lost and another time a check was forged and

deposited by the sub. When a material supplier checks the credit rating of a minority sub many times the firm is new and does not have any credit history or the firm has bad credit. Therefore, the guarantees are necessary; but, by guaranteeing suppliers, the subs never establish a credit rating of their own. Although the paper work can be a burden for the prime contractor, we prefer joint check guarantees to eliminate, as much as possible, claims against the payment bond. To provide ourselves with additional protection, we have all of our subs complete a notarized affidavit after each partial payment to certify that all indebtedness has been discharged. Many times after a sub has been paid we find these affidavits were fraudulently signed. When paying subs more frequently than once a month we constantly measure the amount of work

performed to be sure we do not over-pay. In this instance the State Inspectors are of no help because they will not approve the work except once a month and, of course, they always have the right to reject the work any time before final payment. So a minority sub receives his needed money with little or no retainage withheld than is asked at a later date to return to replace work that has been rejected by the State Inspector. Since the sub has already spent his money, he cannot afford to replace the work that has been subsequently rejected, therefore, the prime contractor is left holding the bag.

Another common problem is that minority firms consistently fall behind schedule. Since the general is responsible to complete on time, assistance must be provided to avoid penalties and damage to your own firm's name. Unfortunately, in

many cases, we can not backcharge a minority sub fully for this assistance because they would end up owing us money.

Naturally, if we were allowed to make our own business decisions as to who should receive a subcontract, many of these minority firms would not be chosen; because we could avoid the special financing requirements, additional administration, and assistance at the site, all of which cost us additional money. Since we must find a way for this program to work more effectively, we suggest the following:

1. Let a prime contractor be allowed to require a performance and payment bond from a minority subcontractor that is new or questionable the same as would be done on a comparable non-minority firm. This would take the burden off of the prime contractor and place it on a bonding company which is more qualified to analyze

a firm's qualifications. If the sub cannot obtain a bond, this should be part of the criteria used to evaluate a waiver of the goal.

2. Secondly, the State of Maryland should adopt the program provided by the Virginia DOT, whereby they compensate a prime contractor up to 15% of the sub's contract price for documented managerial and/or administrative type assistance provided to the minority sub by the prime contractor.

3. Take the burden of financing subs off of the prime contractor. If a sub can not finance his own work, either in-house, through a financial institution, or government agency, the prime should be able to discharge the sub without an obligation to replace them. Government agencies certainly concur that a minority sub can be discharged for just cause, but by demanding

a replacement the prime will probably suffer additional losses by unknowingly finding another sub with similar problems or by paying a higher price than what was anticipated at bid time.

In another area of the program we suggest changes to the Quarterly Participation Report. Currently when completing this form, the total dollars paid is reported based on when the check clears the bank, not when it is issued. No accounting records are kept based on when checks clear, therefore, we are perplexed as to why it cannot be based on when the check is issued which would certainly be easier to maintain. Also, when submitting the report, copies of both sides of the cancelled checks must be attached. This requires someone to go through bank reconciliations every month which is time-consuming and costly. Why can't we just

provide a copy of the check which could easily be done when the check is issued? If there is any later doubt or questions as to the validity of the report, then copies of the cancelled checks could be provided as needed.

The City of Baltimore requirements create an additional problem. Currently when submitting a bid for the City, the bidder must state which minority firms they intend to use (including female business which is still a separate goal) and the dollar amount of each contract at the time of bid. Prior to the bid submission the bidder is responsible to verify that the minority sub is qualified as such. Since the bidding process can become hectic during the last hours when sub prices are received, this verification procedure places additional burdens on the bidder. Recently we were low bidder on approxi-

mately a $5,000,000 project with the City by $930,000, but one of the female businesses listed in our bid package accidentally allowed their certification to expire one month before the bid date. Although the firm was listed in the City's current publication of viable minority firms, our bid was rejected. We strongly suggest that the low bidder be allowed to submit his minority package within five days following the bid date as is currently required by the State of Maryland. This would allow for verification of the status of the minority firm and revision of the minority package, if necessary.

Although we have described several problems with minority firms, we certainly recognize that there are good, qualified firms in the market place, but unfortunately they are few and far between. We have been committed to supporting the Minority

Business Program over the years by providing assistance beyond the requirements. In 1986 we were awarded the Corporate Award for the U.S. Department of Commerce for supporting the ideals of Minority Business Enterprises, one of only 10 firms and the only contractor to receive such an award. However, even we are losing faith in the program because we have absorbed too much of the cost of educating and financing these firms over the years. We prefer to be in the contracting business and would like to see the government take a more active role and place less burden on the prime contractor for providing needed services to the minority firms.

If we can be of any further assistance, please advise.

Yours very truly,

McLEAN CONTRACTING COMPANY

Frederick W. Rich
Vice President & Treasurer